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HARVARD UNIVERSITY, JOHN F. KENNEDY SCHOOL OF GOVERNMENT,
Cambridge, MA, October 3, 2002.

Re S. 2520.

Hon. PATRICK LEAHY,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR LEAHY: Following up on my written statement and on my oral testimony before the Committee on Wednesday, October 2, 2002, the staff of the Committee has asked me to comment on the constitutional implications of changing the current version of S. 2520 to change the word "material" in Section 2 of the bill (page 2, lines 17 and 19) to "purported material."

In my opinion the change would push well over the constitutional edge a provision that is now right up against that edge, but probably barely on the constitutional side of it.

As I explained in my statement and orally, the Supreme Court has from the *Ginzburg* decision in 1966 to the *Hamling* decision in 1973 to the Free Speech Coalition decision in 2002 consistently refused to accept that "pandering" may be an independent offense, as opposed to being evidence of the offense of obscenity (and, by implication, child pornography). The basic premise of the pandering prohibition in S. 2520 is thus in some tension with more than thirty-five years of Supreme Court doctrine. What may save the provision, however, is the fact that pandering may also be seen as commercial advertisement, and the commercial advertisement of an unlawful product or service is not protected by the Supreme Court's commercial speech doctrine, as the Court made clear in both *Virginia Pharmacy* and also in *Pittsburgh Press v. Human Relations Commission*, 413 U.S. 376 (1973). It is important to recognize, however, that this feature of commercial speech doctrine does not apply to non-commercial speech, where the description on advocacy of illegal acts is fully protected unless under the narrow circumstances, not applicable here, of immediate incitement.

The implication of this is that moving away from communication that could be described as an actual commercial advertisement decreases the availability of this approach to defending Section 2 of S. 2520. Although it may appear as if advertising "material" that does not exist at all ("purported material") makes little difference, there is a substantial risk that the change moves the

entire section away from the straight commercial speech category into more general description, conversation, and perhaps even advocacy. Because the existing arguments for the constitutionality of this provision are already difficult ones after Free Speech Coalition, anything that makes this provision less like a straight offer to engage in a commercial transaction increases the degree of constitutional jeopardy. By including "purported" in the relevant section, the pandering looks less commercial, and thus less like commercial speech, and thus less open to constitutional defense I outlined in my written statement and oral testimony.

I hope that this is helpful.

Yours sincerely,

FREDERICK SCHAUER,
Frank Stanton Professor of the First Amendment.

ORDERS FOR TUESDAY, JANUARY 14, 2003

Mr. FRIST. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in adjournment until 9:30 a.m., Tuesday, January 14. I further ask that following the prayer and pledge, the morning hour be deemed expired, the Journal of proceedings be approved to date, the time for the two leaders be reserved for their use later in the day, and there then be a period of morning business until 12:30 p.m., with the time equally divided and Senators permitted to speak for up to 10 minutes each.

I ask unanimous consent that the Senate recess from the hour of 12:30 p.m. to 2:15 p.m. for the weekly party caucuses.

The PRESIDING OFFICER. Without objection, it is so ordered.

PROGRAM

Mr. FRIST. As I mentioned earlier, we hope to have the committee resolution agreed to. Members should be on notice that rollcall votes are therefore possible beginning tomorrow morning.

ADJOURNMENT UNTIL 9:30 A.M. TOMORROW

Mr. FRIST. If there is no further business to come before the Senate, I ask unanimous consent that the Senate stand in adjournment under the previous order.

There being no objection, the Senate, at 7:07 p.m., adjourned until Tuesday, January 14, 2003, at 9:30 a.m.

NOMINATIONS

Executive nominations received by the Senate January 13, 2003:

DEPARTMENT OF THE TREASURY

JOHN W. SNOW, OF VIRGINIA, TO BE SECRETARY OF THE TREASURY, VICE PAUL HENRY O'NEILL, RESIGNED.

IN THE ARMY

THE FOLLOWING ARMY NATIONAL GUARD OF THE UNITED STATES OFFICER FOR APPOINTMENT IN THE RESERVE OF THE ARMY TO THE GRADE INDICATED UNDER TITLE 10, U.S.C., SECTION 12203:

To be major general

BRIG. GEN. EDWIN H. ROBERTS JR., 0000

IN THE AIR FORCE

THE FOLLOWING NAMED OFFICERS FOR APPOINTMENT TO THE GRADE INDICATED IN THE UNITED STATES AIR

FORCE AND FOR REGULAR APPOINTMENT (IDENTIFIED BY AN ASTERISK (*)) UNDER TITLE 10, U.S.C., SECTIONS 624 AND 531:

To be lieutenant colonel

FRANK W. * ALLARA JR., 0000
PAUL J. * ANDREWS, 0000
JEFFREY L. * ANDRUS, 0000
KENNETH J. * BOONE, 0000
ROBERT R. * COOPE, 0000
GARY J. * GERACCI, 0000
DARLENE R. * HACHMEISTER, 0000
ALLEN J. * HEBERT JR., 0000
MICHELE M. * JOINES, 0000
LARA INGA * LARSON, 0000
ROSE MARIE * LEARY, 0000
STEVEN C. * MALLER, 0000
ROY C. * MARLOW, 0000
COLIN A. * MIHALIK, 0000
MARIA * SANTOS, 0000
CHARLES J. * SNYDER, 0000
JESUS L. * SOJO, 0000
CRAIG S. * STEWART, 0000
LUKE UNDERHILL, 0000
MICHAEL N. * WAJDOWICZ, 0000
GLYNIS D. * WALLACE, 0000

THE FOLLOWING NAMED OFFICERS FOR APPOINTMENT TO THE GRADE INDICATED IN THE UNITED STATES AIR FORCE UNDER TITLE 10, U.S.C., SECTION 624:

To be major

NANCY M. ACAMPADO, 0000
FEDERICO C. AQUINO JR., 0000
MEDHAT G. BADER, 0000
ROBERT K. BOGART, 0000
ALVIS D. BURRIS, 0000
MARJORIE M. CABELL, 0000
JEFFERY A. CASEY, 0000
ANGELA L. DELGADO, 0000
JASON C. DORMINEY, 0000
NEIL E. DUNLOW, 0000
JOHN C. DUNNING, 0000
THOMAS P. EDMONSON, 0000
STEPHANIE A. FAGEN, 0000
AGUSTIN L. FARIAS, 0000
DOUGLAS M. FERRIS JR., 0000
SHAI T. HALL, 0000
DERREK D. HENRIE, 0000
RODNEY C. JOHNS, 0000
RANDALL S. JONES, 0000
ROBERT H. JUDY, 0000
MATTHEW D. KATZ, 0000
AMAR KOSARAJU, 0000
JASON S. LENK, 0000
DOUGLAS M. LITTLEFIELD, 0000
PAUL A. LONGO, 0000
VICTOR B. MAGGIO, 0000
IGOR MARYANCHIK, 0000
SAPNA J. MELCHIORRE, 0000
JUAN K. PACKER, 0000
DARON C. PRAETZEL, 0000
THOMAS P. RILEY, 0000
ENRIQUE E. ROSADO, 0000
JENNIE LEIGH L. STODART, 0000
GEORGE A. TANKSLEY JR., 0000
KAREN ANN THOMPSON, 0000
MINH C. VU, 0000
KIM L. WILKINSON, 0000
JUNKO YAMAMOTO, 0000
JAMES H. YAO, 0000

THE FOLLOWING NAMED OFFICERS FOR APPOINTMENT TO THE GRADE INDICATED IN THE UNITED STATES AIR FORCE AND FOR REGULAR APPOINTMENT (IDENTIFIED BY AN ASTERISK (*)) UNDER TITLE 10, U.S.C., SECTIONS 624 AND 531:

To be lieutenant colonel

GREGORY A. * ABRAHAMIAN, 0000
EDITH A. * AGUAYO, 0000
ALAN K. * ANZAI, 0000
RICHARD D. * BAKER, 0000
CATHERINE S. * BARD, 0000
GORDON W. * BATES JR., 0000
RICHARD J. * BEAN, 0000
CHARLES P. * BIEDIGER, 0000
JOSEPH A. * BIFANO, 0000
DAN W. BODILY, 0000
JAMES J. * BORDERS, 0000
JAMES E. BOYD, 0000
MARK P. BURTON, 0000
LEANDRO T. CABANILLA, 0000
JEFFREY S. * CALDER, 0000
DAVID B. * CARMACK, 0000
JOHN B. * CHACE, 0000
JONATHAN T. * CHAI, 0000
ANDY CJ * CHIOU, 0000
NISHAN H. * CHOBANIAN JR., 0000
THOMAS F. CLARKE, 0000
GARY L. * COHEN, 0000
EDWARD J. * COHN JR., 0000
ANDREW J. * COLLINS, 0000
KEVIN P. * CONNOLLY, 0000
DAVID D. COPP, 0000
DAVID L. * CUNNINGHAM, 0000
JOSEPH L. CVANCARA, 0000
DAVID R. * DELONE, 0000
SUSAN E. * DESJARDINS, 0000
LEE H. * DIEHL, 0000
BRIAN B. DURSTELER, 0000
MARK A. ERICKSON, 0000